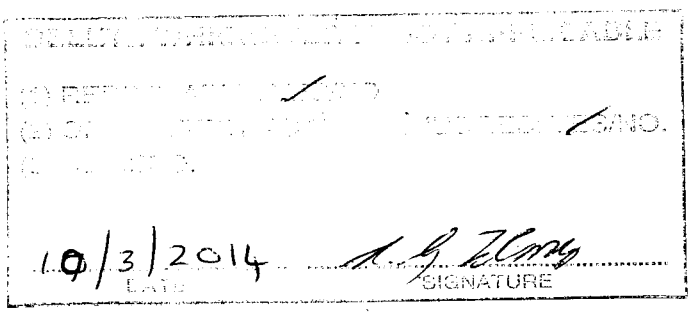
IN THE HIGH COURT OF SOUTH ARICA

GAUTENG DIVISION, PRETORIA

(Functioning as MPUMALANGA DIVISION, NELSPRUIT)

10/3/14

CASE NO: CC 27/2012



IN THE MATTER BETWEEN:

LOGANDERAN NAIDOO **APPLICANT/APPELLANT**

AND

THE STATE **RESPONDENT**

TOLMAY, J:

BACKGROUND

[1] The applicant, who was convicted and sentenced by this court, brought an application for leave to appeal in which he also requested leave to lead further evidence in terms of sec 316(5) of the Criminal Procedure Act, 51 of 1977 (the CPA).

[2] The application to lead further evidence was argued before me and needs to be determined before I proceed to deal with the application for leave to appeal.

[3] The applicant was found guilty of two charges of murder, two of attempted murder and one of conspiracy to commit murder as well as contravention of sec 28(1) of the Explosives Act 26 of 1956. He was sentenced to life imprisonment on each of the two murder charges, 8 years on each of the attempted murder charges, 7 years on the conspiracy to murder charge and 7 years on the charge of possession of explosives.

[4] The background to this case was that the court found that the applicant conspired with a certain Mohammed Ishmael Khan ("M Khan") and Zameer Khan to kill Verisha Govender. It was found that the applicant supplied the hand grenade and demonstrated how it should be used and instructed the Khans to execute the plan. Zameer Khan and M Khan drove to Nelspruit where a hand grenade was thrown through the window of a house where they suspected Ms Govender lived. However Ms Govender was not in the house and Ms Patricia Rebecca Bangad Pillay and a minor child Yetska Michaela Pillay died in the explosion. Kevin Pillay and Daphne Pillay were also in the house, the latter sustained slight injuries as a result of the explosion. Both Mr Zameer Khan and M Khan are serving sentences of life imprisonment pertaining to the same incident. The applicant was found guilty on the evidence of M Khan, a single witness who was also an accomplice.

APPLICABLE LEGAL PRINCIPLES

[5] In terms of sec 316(5)(a) read with section 316(1) of the CPA an application for leave to appeal by an accused convicted by a High Court may be accompanied by an application to lead further evidence, relating to the prospective appeal. Section 316(5)(b) sets out the requirements for such an application and reads as follows:

"(b) An application for further evidence must be supported by an affidavit stating that –

(i) Further evidence which would presumably be accepted as true, is available;

(ii) If accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) There is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial."

[6] It would seem that sec 316(5) constitutes a codification of the guidelines which the courts previously set out to be followed when determining the question whether new evidence should be allowed[1]. These principles have also been confirmed in later decisions and also in decisions after the advent of the Constitution[2].

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[1] R v Van Heerden & Another 1956(1) SA 366; S v De Jager, 1965(2) 612 AD

[2] S v Stevens 1983(3) SA 649 (A); S v Dampies 1999(1) SACR 598 (OPA); S v Marais 2010(2) SACR 606 on 614; S v EB 2010(2) SACR 524 (SCA) on 529; S v Kardia 2006(2) SACR 75 (SCA); S v Jafhta 2010(1) SACR 136 (SCA); S v

[7] The aforementioned authorities determine that courts should only allow further evidence after conviction and sentencing in exceptional circumstances and if the aforesaid requirements are met. The reasons for the cautious approach in allowing further evidence are many, but finality in criminal cases as well as the possibility of interference with evidence and the possibility of corruption and fraud have been mentioned as reasons why the courts should not lightly allow such evidence to be led[3]. In **S v Stevens**[4] it was stated that:

"*while it is in the interest of justice and in public interest that those who are guilty of an offence ought to be convicted, it is also in the interest of justice that finality should be reached in criminal cases and that they should not be allowed to drag on indefinitely ...*"

After a court has made a finding on facts available at the trial, the very real potential exists that evidence could be tampered with as an accused now knows which facts resulted in the conviction and could attempt to adjust evidence to support his defence.

[8] In the light of the requirements that should be met and the dangers inherent in allowing further evidence at this stage, a court has an obligation to closely scrutinise the evidence that an accused wishes to lead. New evidence carelessly allowed in a criminal matter after conclusion of a trial could invite bad preparation by the legal representatives and could lead to fraud,

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Michele 2010(1) SACR 131 (SCA) and S v Barnard 2004(1) SACR 191 (SCA); S v Musiker 2013(1) SACR 517 (SCA); Maemu v S [2012] JOL 28585 (SCA) and S v Marain [2010] ZACC 16 (CC)

[3] S v M 2003(1) SA 341 (SCA); R v Van Heerden, supra; S v Nkala 1964(1) SA 493 (A) at 497 H; S v Zondi 1968(2) SA 653 (A) at 655 F

[4] S v Stevens, supra

corruption and to tampering with evidence. A court must be extremely careful to avoid serious abuses in the administration of justice. In each case the court will be obliged to exercise a value judgment on the facts of that specific case, keeping in mind the principles already alluded to.

THE APPLICATION TO LEAD FURTHER EVIDENCE

[9] The grounds for the application to lead further evidence are set out in an affidavit attached to the application for leave to appeal. Applicant instructed a new attorney at sentencing stage of the proceedings. Applicant alleges that his present attorney found evidence, which if it is to be found true may have made a fundamental difference in the outcome of the trial. During argument Mr Hellens, on behalf of applicant abandoned certain of the evidence that the applicant initially wanted to lead. The abandoned evidence relates primarily to certain allegations pertaining to the evidence of Deenah Govender, a police officer that testified at the trial and who was called by the court as a witness, as well as allegations pertaining to the motives of the Cato Manor Serious Crime Unit. It also includes evidence about the origins of the hand grenade used during the attack.

[10] Applicant's counsel indicated that he wants to lead evidence pertaining to the following remaining issues:

10.1 Whether the year-end party to which M Khan referred in his evidence took place on the 21st December 2006. A certain Dhurum Raj

made an affidavit contradicting this evidence and refers to documents allegedly corroborating this averment. Applicant states that he also wants to lead the evidence of the following people pertaining to this issue;

(a) The evidence of Anton Klein together with documentary evidence corroborating the evidence relating to the year-end party;

(b) The evidence of Jan Buitendag on the issue relating to the expenses of the business of the applicant in connection with the issue of whether the applicant's business expended moneys on any other party at the relevant time including reference by him in his affidavit to various financial aspects and employees of the business of the applicant;

10.2 That during 2007 M Khan had not relocated to Pietermaritzburg but worked at Nqutu and Umzinkhulu until October 2007, and that as at 24 April 2008 M Khan had not moved to Pietermaritzburg but worked for Mr Pandaram at Nqutu

10.3 Evidence demonstrating the fact that the father of Sydney Pandaram had passed away on 24th April 2007 and that the phone call referred to by Sydney Pandaram and M Khan which in evidence was said to have taken place, in September 2009, could not have taken place during that time.

10.4 Evidence pertaining to the issues arising out of the case docket, Malvern CAS 010903 relating to the following:

(a) The robbery that took place at the premises of Sydney Pandaram, the seriousness of the injuries sustained during the robbery, the value of the property taken and the fact that a person who committed the robbery was permitted by the Investigating Officer to phone Syndey Pandaram relating to the robbery and did phone him. Further that in that conversation one of the persons responsible for the robbery informed Sydney Pandaram that he had committed the robbery at Sydney Pandaram's home on the instructions of Joe Hlope.

10.5 The evidence of Lavin Ishwarchand relating to the issue of him being approached by Sydney Pandaram in 2005 to arrange for the assassination of Joe Hlope and related issues.

10.6 The question whether the hand grenade attack on the 23rd December 2006 referred to in the evidence was reported on the front page of the Sunday Times or not and the issue as to whether it was reported on the front page of any newspaper and if reported at all, in what newspaper.

10.7 Evidence relating to who flew on flight SA 8507 from Durban to Nelspruit on 24 April 2013 (that was the day that Mr Pandaram came to testify during this trial) and who flew back from Nelspruit to Durban on the same date in the afternoon thereof, as well as the fact that Sydney Pandaram is alleged to have paid for one other person to fly from Durban on the day that he gave evidence.

[11] At the hearing, Mr Hellens, quite correctly and in the execution of his duty as an officer of the court disclosed that annexure "LN 25" to applicant's affidavit which sought to prove that Mr Pandaram paid for the air tickets of certain people who flew to Nelspruit, was a fraudulent document.

COMMON CAUSE FACTS

[12] I was also provided with certain common cause facts which the defence and the DPP agreed to. It must be stated however that the DPP did not concede that this evidence should be allowed, despite their correctness.

[13] The following is common cause between the DPP and the defence

13.1 The father of Syndey Pandaram died on 24th April 2007. The date on which M Khan and Sydney Pandaram alleged that a conversation took place between them, which conversation led Sydney Pandaram to disclose M Khan's involvement in the crime to the South African Police, was a date in September 2009. The evidence by M Khan in court was that he phoned Mr Pandaram in order to talk to his father and Mr Pandaram confirmed this in his evidence, therefor M Khan and Mr Pandaram's evidence could not be true;

13.2 It is common cause that on 1st September 2003 a very serious robbery took place at the home of Sydney Pandaram. Pandaram was seriously wounded with stab wounds to his left upper arm, left side buttock, left armpit and right arm with property of considerable value having been

taken. This is in contradiction with Mr Pandaram's evidence in court during the trial.

13.3 One of the persons responsible for the robbery Simphiwe Sipho Mbhele asked the investigating officer to make a phone call. He made the phone call. The phone call was to Sydney Pandaram. He informed Sydney Pandaram in that phone call that Joe Hlope had instructed him to commit the robbery at the house of Pandaram.

[14] I will now proceed to deal with the evidence that the applicant wishes to lead under separate headings.

THE YEAR-END PARTY AND PAYMENT TO KHAN

[15] The evidence of M Khan given at the trial suggested, and the Court made a finding that applicant had paid M Khan a sum of money after the grenade attack when they were together at a year-end party. This evidence has now been investigated and applicant alleges that he can now state that he has evidence which he can present which directly disproves this statement. The evidence is the following:

15.1 In his evidence in chief M Khan made it clear that he received R2 000 (two thousand rand) from applicant at the year-end function which took place after the attack that took place in Nelspruit. He also indicated that Joe had more money for him.

15.2 In two statements, both which were disclosed as witness statements Mr Khan claimed that it had taken him and Zameer Khan two days after the attack to get back to Durban.

15.3 In his written statement he therefor makes it clear, as he had done in his evidence, that he received the R2 000 at the year-end party. Applicant alleges that on his version this had to have been on the 25th or 26th of December 2006. Applicant alleges that this is not possible as it is clear from the annexures to the affidavit of Dhurum Raj that the Christmas party took place prior to the attack taking place in Nelspruit. It is then alleged that therefore it is not possible that his evidence could be true.

[16] M Khan was cross-examined by the applicant's legal representatives during the trial, yet this aspect was never raised. The applicant himself never raised this point in his evidence before this court. The evidence was available during the trial and applicant should have raised it at that stage. There is no explanation for the failure to deal with this evidence during the course of the trial. There is also no explanation why applicant's previous legal representatives failed to canvas this aspect during the trial.

[17] I am not satisfied that there is a reasonable explanation for the failure to lead the evidence pertaining to the year-end function and in the absence of that the requirements set out in the act and confirmed in the authorities referred to

have not been met. I am also not of the view that a different finding in this regard could have led to a different verdict, and therefore this evidence also fails the test of relevance. I must also point out that in the judgment the court dealt with the fact that M Khan was not a satisfactory witness in many respects. In the light thereof yet another indication of his shortcomings as a witness cannot assist applicant.

THE EVIDENCE PERTAINING TO MR PANDARAM

[18] The applicant raised the following issues pertaining to the evidence of Mr Pandaram:

(a) applicant did not have prior notice of the fact that he was to be called as a witness;

(b) Mr Pandaram lied about the facts pertaining to the robbery at his house;

(c) applicant has evidence that Mr Pandaram approached someone to assassinate Joe Hlope; and

(d) the facts pertaining to what motivated M Khan to phone his house was untrue.

[19] The applicant alleges that the state called Mr Sydney Pandaram as its last witness and applicant states that as there was no prior statement by Mr Pandaram he had no advance notice that he would testify that he therefore

could not have foreseen the nature of his evidence and could not prepare properly on this aspect.

[20] It must be noted that Mr Pandaram's alleged role in framing applicant arose during cross-examination of the state witness by applicant's legal representative. The allegation that Mr Pandaram handed a hand grenade to M Khan to kill Joe Hlope was made by applicant's counsel during cross-examination of M Khan. Mr Kotze argued that the state did not list Mr Pandaram as a witness and he was only called as a result of what was put to M Khan by the accused's legal representatives during cross-examination. It was argued that the state thus would not have called Mr Pandaram, but for the version put to state witnesses on behalf of the applicant. This is indeed correct and under these circumstances it is untenable that the applicant could argue that he could not have foreseen that Mr Pandaram would be called as a witness or that he could not have foreseen the nature of the evidence. His legal representatives certainly would have canvassed the relevant facts pertaining to Mr Pandaram's evidence, seeing that the applicant's defence is that Mr Pandaram framed him. Furthermore after Mr Pandaram testified applicant certainly would have given proper instructions and would have consulted extensively with his legal representatives and would have alerted them to all relevant facts. Applicant's legal representatives did not request that the matter stand down nor did they indicate that they needed time to consider his evidence or needed to investigate aspects of his evidence. It is also of importance to note that applicant at no point alleged that his legal

representatives did not consult properly with him or did not execute his instructions.

[21] It would seem that the applicant attempts to justify the failure to ask for time to consider Mr Pandaram's evidence on the Court and alleges that as the Court made it clear that the matter was going to be finalised during that sitting of circuit court, it did not seem possible for the applicant to apply for a postponement to enable an investigation of Mr Pandaram's evidence. The *innuendo* that the court would not have considered granting a postponement or letting the matter stand down in appropriate circumstances is preposterous. Applicant had two legal representatives appearing for him, at that stage, who certainly would not have hesitated to bring any application they deemed necessary and in the interest of their client. It is important to note that at the point that Mr Pandaram testified there was in any event several weeks left of term and if an application was brought for a postponement it could have been considered and the matter could even have been postponed to a later date during that term. In any event, even though this court attempts to finalise matters expeditiously, sometimes a longer postponement is unavoidable and that could have been arranged as a last resort, if it was deemed to be in the interest of justice. In the absence of any application for postponement during the trial this argument has no merit. I also find it interesting that there are no affidavits from the former legal representatives in this regard.

[22] The evidence of Mr Pandaram's father's death, is in the light of the common cause facts not in dispute and gives an indication that Mr Pandaram was not truthful but it must be remembered that the applicant was not convicted on his evidence and even if this evidence was available at the trial and even if I rejected Mr Pandaram's evidence it could not have had any effect on the outcome of the trial.

[23] During cross-examination Mr Pandaram denied a number of facts *inter alia* to indicate that a serious robbery took place at his home on 1 September 2003, where he was seriously wounded and that the accused in that matter had been instructed by Joe Hlope to commit the robbery. One of Mr Pandaram's employees died after having been injured during this robbery.

[24] This evidence seeks to proof that Mr Pandaram had sound reason to bear Joe Hlope a grudge and his evidence pertaining to the robbery was false. The applicant testified during the trial that he saw Mr Pandaram giving M Khan a hand grenade to "sort out" Joe Hlope. The applicant's evidence was that Mr Pandaram framed him in this crime due to bad blood between them. Applicant wants to call Mr Ischwarsand to testify that Mr Pandaram approached him to assassinate Joe Hlope.

[25] In my view the evidence pertaining to the robbery at Mr Pandaram's home and the fact that he may have approached someone to assassinate Joe Hlope

has no bearing on this case. Neither does it indicate that the applicant did not commit the acts that he was accused of and convicted for. This evidence could not have any effect on the decision of this court. Even if Mr Pandaram wanted to assassinate Joe Hlope or had access to hand grenades these facts could not play any role in the applicant's conviction, as it could never be said that those facts must lead to the conclusion that the applicant did not have access to a hand grenade or did not plan the attack in Nelspruit. I have already dealt in my judgment with the improbability of the allegation that Mr Pandaram framed the applicant for the crimes that he was convicted for. I reiterate that it is highly improbable as Mr Pandaram did not at any point before or during his evidence at this trial accuse the applicant of involvement in the crimes committed in Nelspruit. M Khan is the person who implicated the applicant. Consequently I will not allow this evidence as no reasonable explanation is given for the failure to lead the evidence at the trial nor is it relevant. The requirements that need to be met to allow the evidence have not been met.

EVIDENCE PERTAINING TO THE FRONT PAGE OF THE SUNDAY TIMES, 23 DECEMBER 2013

[26] This evidence relates to the question whether the hand grenade attack of 23rd December 2006 referred to in the evidence was reported on the front page of the Sunday Times (as alleged by M Khan) or not and the issue as to whether it was reported on the front page of any newspapers and if reported at all, in which newspaper.

[27] It is common cause that at no time whatsoever was the hand grenade incident which took place in Nelspruit on 23rd December 2006 reported on the front page of any newspaper. In particular it was not reported on the front page of the Sunday Times at the time referred to in the evidence. The report was however carried on the third page of the Post Newspaper dated 27 to 31 December 2006.

[28] The evidence pertaining to the Sunday Times front page does not take the matter any further as it is common cause that the incident was published and an error pertaining to where it was published could not result in another outcome to the trial. Furthermore this should have been dealt with at the trial and there is no explanation at all why this was not done. Consequently the applicant did not meet the requirements and the evidence should not be allowed.

KHAN'S ALLEGED MOVE

[29] Applicant wants to lead evidence that as at 24 April 2007 M Khan had not moved to live in Pietermaritzburg and was working for Mr Pandaram at Nqutu. There exists no reasonable explanation for the fact that this evidence was not led at the trial nor could it have any effect on the outcome of the trial and consequently the evidence should not be allowed.

EVIDENCE RELATING TO WHO FLEW ON FLIGHT SA 8507 FROM DURBAN TO

NELSPRUIT ON 24 APRIL 2013

[30] The evidence relating to who flew on flight SA 8507 from Durban to Nelspruit on 24 April 2013 and who flew back from Nelspruit to Durban on the same date in the afternoon as well as who paid for the said flight is in my view totally irrelevant. It must be noted that this date and flight refers to the day that Mr Pandaram had to come to court to testify. There is no indication that this is relevant to this case in any conceivable way.

CONCLUSION

[31] In the light of all the facts and for the reasons set out above I am of the view that none of the further evidence should be allowed. In my view the mere fact that some evidence may after the trial be proven to be incorrect does not automatically leads to the conclusion that it should be allowed on appeal. These facts must also be tested against the requirements already referred to.

[32] This application illustrates the very real possibility of tampering with evidence as we now know that "LN 25" was a fraudulent document obtained. In the light of that the SAPS is requested to investigate who is responsible for this and to report to this court pertaining the progress made in this investigation.

[33] I make the following order:

33.1 The application to lead further evidence on appeal is dismissed.

33.2 The SAPS is requested to investigate who is responsible for the production of annexure "LN 25" and to report to this court which steps are taken to prosecute whoever is responsible.

R G TOLMAY

JUDGE OF THE HIGH COURT